89-2031

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KUANG HSUNG J. CHUANG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioner's conviction was based largely upon evidence obtained, directly or indirectly, from two warrantless searches. The first was a week-long examination of the records of Golden Pacific National Bank ("Golden Pacific"), which petitioner controlled, by agents of the Office of the Comptroller of the Currency ("OCC"). The second was a search of petitioner's law office by agents of the Federal Deposit Insurance Corporation ("FDIC"), which had been appointed receiver of Golden Pacific after the OCC closed the bank. Petitioner moved to suppress evidence derived from both searches. The District Court denied both motions and admitted the evidence; the Court of Appeals affirmed.

The questions presented are:

(1) Whether the president and majority stockholder of a bank, who dominated its activities and demonstrated a desire to keep certain bank records private, has standing to challenge a search of those records.

(2) Whether 12 U.S.C. § 481, which authorizes warrantless searches of national banks by agents of the OCC without any limitations on time, scope or manner of execution, is constitutional.

(3) Whether government agents with statutory authority for the warrantless search of a business can search other premises without probable cause to believe that the business is being conducted from the premises searched.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are identified in the caption.

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No. ———

KUANG HSUNG J. CHUANG,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Kuang Hsung J. Chuang petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and the district court's refusal to suppress evidence.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 897 F.2d 646 and is reprinted at 1a-13a. The opinion of the United States District Court for the Southern District of New York denying petitioner's motion to suppress evidence seized during the warrantless search of petitioner's law office by the Federal Deposit Insurance Corporation ("FDIC") is reported at 696 F. Supp. 910 and is reprinted at 17a-27a. Oral rulings of the District Court

disposing of petitioner's motion to suppress evidence seized during the warrantless search of Golden Pacific National Bank ("Golden Pacific") by agents of the Office of the Comptroller of the Currency ("OCC") are reprinted at 28a-36a.

JURISDICTION

The opinion of the Court of Appeals affirming petitioner's conviction was entered on February 28, 1990. A timely petition for rehearing was denied on March 29, 1990. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 481 provides in relevant part:

> The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided*, That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture

> in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title. The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

STATEMENT OF THE CASE

A. Summary

Petitioner Kuang Hsung J. Chuang, a lawyer, was the president and controlling stockholder of Golden Pacific, the first Chinese-owned bank in New York City's Chinatown. In June 1985, agents of the OCC conducted a surprise warrantless raid on Golden Pacific. After examining records for a week, the OCC declared Golden Pacific insolvent, closed it and designated the FDIC as receiver.[1] Beginning the next day, FDIC agents searched

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[1] Events subsequent to the closing demonstrated that Golden Pacific was not insolvent at the time it was closed by the OCC. In fact, the FDIC has recently issued a press release announcing that all of the creditors of the bank have been paid in full as a result of the liquidation of the bank, a result that stands in stark contrast to current news reports about financially ruinous bank failures. The liquidation actually resulted in a substantial surplus, even after

the entire building in which Golden Pacific was located, including petitioner's law offices, located on the third floor of the building.

Evidence derived from both searches—the week-long inspection by the OCC and the search of petitioner's law office by the FDIC—was admitted, over petitioner's objection, by the United States District Court for the Southern District of New York at the criminal trial of petitioner and another. The United States Court of Appeals for the Second Circuit affirmed petitioner's conviction, holding that he lacked standing to challenge the OCC search of Golden Pacific and that the search of his law office was proper.

B. The Underlying Charges

Petitioner is an immigrant from Taiwan, with law degrees obtained both in Taiwan and in the United States. He founded Golden Pacific in 1977. Principally through petitioner's efforts, and because of the unique service it provided to the Chinese-American community, Golden Pacific was a remarkable success. By 1985, it had over $150 million in assets, with eight branches in the United States (in addition to its main office) and representative offices in the Far East. The Government's proof at trial demonstrated that Chuang dominated every aspect of Golden Pacific's activity and attended to every detail of its business; indeed as part of its proof the Government introduced testimony that the bank's board of directors

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payment of over $13 million in expenses attributable solely to the liquidation.

Petitioner sought to prove at trial that Golden Pacific was not insolvent. The District Court refused to permit him to do so, although the jury had been informed that the OCC had closed the bank. While petitioner does not believe that the closing of the bank was justified he does not challenge it in this proceeding.

was often ignorant of its affairs and relied entirely on petitioner. Tr. 431-32, 491-95.[2]

The focus of the criminal charges against petitioner was a particular form of investment offered by Golden Pacific to its customers, known as a "non-negotiable certificate." At the time Golden Pacific began to sell non-negotiable certificates, federal law barred national banks from offering higher than a specified rate of interest on regular certificates of deposit. *See* 12 C.F.R. § 217.7 (1980). The non-negotiable certificate program permitted customers to earn a higher rate of return than permitted by this ceiling.

The key question at trial was whether the non-negotiable certificates were "deposits" under banking law. A deposit is money lent to a bank by a customer, for the repayment of which the bank is liable. Deposits are insured by the FDIC, and must be reported by the bank as liabilities on periodic financial statements to the OCC known as "call reports." Petitioner and Golden Pacific took the position, however, that the non-negotiable certificates were not deposits but were custodial accounts, *i.e.*, funds given to a bank for investment by the bank as agent for its customers. Since the business in which the bank invests the funds, rather than the bank itself, is liable for repayment of custodial account funds to the customer, they need not be reported on call reports and are not insured by the FDIC. Golden Pacific neither reported the non-negotiable certificate balances on its call reports nor paid the premiums for FDIC insurance of the certificates.[3]

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[2] "Tr. refers to the transcript of the trial. "[Date] Tr." refers to the transcript of pre-trial proceedings held on the indicated date.

[3] Petitioner presented evidence that the OCC, the Federal Reserve Board, and Golden Pacific's outside counsel had approved the non-negotiable certificate program. The government presented evidence, which the jury apparently credited, that neither the lawyers nor the government agencies had been accurately informed about the operation of the program.

The government contended, and the jury found, that the non-negotiable certificate funds were deposits rather than custodial accounts. Petitioner was therefore found guilty of conspiracy to defraud the United States and of making false statements on call reports. Petitioner was also convicted of making false statements about the non-negotiable certificate program to OCC examiners; of misapplying bank funds in the use of the proceeds of the non-negotiable certificates; of defrauding purchasers of non-negotiable certificates by failing to disclose that the certificates were not insured by the FDIC [4]; and of conspiring to cover up campaign contributions illegally made with bank funds.[5]

C. The Searches

In 1985, a former employee of Golden Pacific, whom petitioner had accused of participating in a check-kiting scheme, went to federal authorities and made allegations about the non-negotiable certificate program. Representatives of the OCC then asked an Assistant United States Attorney to apply for a warrant to search bank records; the prosecutor declined to do so. 3/10/88 Tr. 231-32. The OCC examiners then armed themselves with an administrative subpoena compelling the production of records relating to the non-negotiable certificate account. Although notice had been given to Golden Pacific prior to all earlier OCC examinations, 3/10/88 Tr. 250, on Monday, June 17, 1985, the examiners entered the bank without warning, demanded to meet with petitioner, produced the subpoena, and called for production of records relating to the non-negotiable certificates—records which, according to the government, petitioner had previously

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[4] It was undisputed at trial that prior to the OCC's closure of Golden Pacific, all holders of non-negotiable certificates were repaid their funds in full and on time; as noted *supra* n.1, all certificate holders were repaid in full when Golden Pacific was closed.

[5] Petitioner was sentenced to concurrent five-year jail terms, and to make restitution in the amount of $200,000.

concealed from the examiners. Tr. 2300-01. Responding to the examiners' show of authority, petitioner directed his chief assistant to produce the records. 3/10/88 Tr. 252-54. During that week, OCC examiners examined in detail records relating to the non-negotiable certificates. The information obtained from this examination—which for Fourth Amendment purposes was a search, *New York v. Burger*, 482 U.S. 691, 699 (1987)[6]—was the foundation of the government's proof against petitioner.

As a result of the information obtained during the search, and of what the OCC considered to be unsatisfactory answers to questions about the extent of the assets corresponding to the non-negotiable certificates, the OCC declared Golden Pacific insolvent on June 21, 1985, and appointed the FDIC as receiver pursuant to 12 U.S.C. § 1821(c).[7] The FDIC then began a thorough search of the entire building in which Golden Pacific had its headquarters.

Located on the third floor of this building were the offices of Chuang & Associates, a law firm of which petitioner was the principal. The District Court found that Chuang & Associates was an entity separate from Golden Pacific. 18a-19a. On Saturday, June 22, an FDIC attorney entered the law firm offices through an interior stairway connecting it to the bank; she testified that she did not see a sign identifying the law firm, although it was undisputed that such a sign existed. 19a. On Monday morning, June 24, one of petitioner's associates in the law firm informed the FDIC that the law firm's offices were separate from the bank. Nonetheless, over the course of the next week the FDIC thoroughly

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[6] The OCC admitted that one of its purposes was to gather evidence for a possible criminal prosecution. 3/10/88 Tr. 260.

[7] Petitioner asked the OCC for a few days' time to demonstrate that there were sufficient assets to meet Golden Pacific's liabilities but the OCC refused. In fact, as noted *supra* n.1, the bank's assets did exceed its liabilities.

searched petitioner's law office and seized evidence that was introduced against petitioner at trial.[8]

D. The Decisions Below

1. The District Court

Petitioner timely moved to suppress evidence obtained during both the OCC search of Golden Pacific and the FDIC search of his law firm. The District Court denied the latter motion in a written opinion. 17a-27a. The court held that the FDIC, as receiver, had "the power and the duty to marshal the Bank's assets and to wind up its affairs." 24a. Accordingly, the court held, relying on *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981), that the FDIC had power to search the entire bank without a warrant. The court further held that a receiver has power to search a "law office [which] is commingled with the business for which the receiver has been appointed." 24a. Since the court found that the law firm was petitioner's only office and that bank business as well as law office business was conducted from the offices of Chuang & Associates, it found the FDIC's search of the law firm to be proper. 21a-26a.

The District Court's disposition of the other prong of petitioner's suppression motion, relating to the week-long search of Golden Pacific by the OCC, was less definitive. During a colloquy on the morning trial began, the court noted that it had "considerable difficulty with this objection belonging to anyone but [petitioner's co-defendant]," because the records examined by the OCC were for the most part obtained from the co-defendant's office. 28a. When the question of petitioner's standing on this suppression motion was raised, the court commented that "[w]e'll get to that separately. . . .

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[8] Petitioner contended below that the offices of other attorneys in his firm were searched as well, and that evidence seized from those searches were introduced against him. The lower courts rejected this claim and petitioner does not rely on it herein.

[w]hether Dr. Chuang has some expectation of privacy." 31a. In fact, no express ruling was made on petitioner's standing.

The court did go on to discuss the merits of the motion as it applied to the co-defendant, stating that "the cases do hold that there—that an employee with a private office . . . has sufficient expectation of some kind of privacy in that place to give her standing with respect to a true search of her office." 29a. During colloquy with counsel for petitioner's codefendant, the court expressed "great difficulty [with] holding that on the face of this ancient statute it is unreasonable for the bank examiners of the office of the controller of the currency, who was obligated by law at least twice a year to examine the affairs of every national bank, to go to a magistrate and get a search warrant for every such examination. I think it is unduly burdensome and . . . I think the statute provides the probable cause that a magistrate would find because it is the obligation of the OCC to examine the bank." 33a. The court felt it was unnecessary to consider the statute's failure to limit the scope of a search because there was no suggestion that the examiners had broken into the bank. *Id.*

After the jury's verdict, the court returned to the suppression issue, noting that "although the parties apparently did not understand [the earlier colloquy] as a disposition, it was my intention at the time to make such a disposition." The court then stated that "I had concluded that [the co-defendant] was the only one of the defendants with some privacy interest in the contents of her own space," and that therefore only she had standing to challenge the examination of the bank records. The court further ruled that "the doctrine that a search warrant is required does not apply in a situation like the regular examination of a national bank in which there is a statutory duty on the OCC regularly to examine the records of the bank." 35a.

2. The Court of Appeals

The Court of Appeals affirmed the denial of both suppression motions. Without passing on the constitutionality of 12 U.S.C. § 481, the court ruled that petitioner lacked standing to challenge the OCC's search of Golden Pacific. The court noted that the documents came principally from the office of petitioner's co-defendant, and that petitioner knew that the documents were subject to periodic examination by the OCC. Thus, the court questioned whether petitioner demonstrated a subjective expectation of privacy in these documents, but assumed that he did. 7a-8a.[9] However, the court held that petitioner's subjective expectation of privacy was not "one society considers reasonable." According to the Court of Appeals, "[i]n view of the pervasive nature of federal regulation of the banking industry, [petitioner], as an officer of the bank, knew that bank documents, whether kept in his office or another office, were subject to periodic examination by the OCC." Thus, any "privacy interest is attenuated to the point where any warrantless examination of his office pursuant to a regulatory scheme may be reasonable within the meaning of the Fourth Amendment." 8a-9a. The Court of Appeals apparently had second thoughts about this blanket exemption of administrative searches from the Fourth Amendment, however, for it went on to note that none of the documents at issue were obtained from petitioner's personal office, and to leave open the theoretical possibility that he might

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[9] The court's assumption was clearly correct. The government itself relied at trial upon testimony that petitioner had concealed the records pertaining to the non-negotiable certificate program from prior government examination and that access to them was limited, even as to bank employees. Tr. 2300-01. *Cf. United States v. Brien*, 617 F.2d 299, 306 n.9 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) (noting relevance to standing issue of limited access to seized records and of fact that defendants "went to great length to keep [their] methods of operation secret.").

have had standing to challenge a seizure of records from his personal office. 9a.[10]

With respect to the FDIC search of the law firm, petitioner did not on appeal challenge the FDIC's authority as receiver to search Golden Pacific. *See* p. 3 n.1 *supra*. Nor did petitioner contest that under appropriate circumstances the FDIC as receiver of a bank can search, without a warrant, premises other than the bank's offices. Petitioner contended, however, that such a search could not be conducted in the absence of probable cause to believe that the premises searched were being used to conduct the bank's business, and that no such probable cause existed in this case. While taking note of petitioner's argument that probable cause was required, the Court of Appeals held only that there was "sufficient cause for the FDIC to believe that there was a commingling of activities in the area searched," because the law office was petitioner's only office in the bank building, the law firm and the bank shared telephone lines, there was "easy access" to the bank from the firm, and there was no building directory listing the firm. 11a.

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[10] In both the District Court and the Court of Appeals, the government contended that evidence derived from the OCC's search was properly admitted even if the statute authorizing the search was unconstitutional, because the OCC's reliance on 12 U.S.C. § 481 was objectively reasonable within the meaning of *Illinois v. Krull*, 480 U.S. 340 (1987). In light of the lower courts' failure to rule on this argument, the patent unconstitutionality of § 481 under prevailing constitutional standards, *see* pp. 17-21 *infra*, and the evidence that the OCC itself entertained some doubt about its authority to conduct the examination, *see* p. 6 *supra*, this Court should not uphold the admission of the evidence on this basis.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are of undeniable importance in the criminal justice system. The issues involved will recur with increasing frequency as the prosecution of white-collar crime, and specifically fraud against financial institutions, becomes more and more aggressive. Law enforcement officials need clear guidelines as to what searches they can lawfully undertake; lower courts as well need this Court's guidance to assess the legality of those searches. The decision of the Court of Appeals in this case, however, conflicts with the decisions of other courts of appeals and of this Court on these important questions of federal law, and requires review by this Court to ensure uniform and correct application of Fourth Amendment law.

I. PETITIONER'S STANDING TO CHALLENGE THE OCC SEARCH

The Court of Appeals ruled that petitioner could not challenge the search of Golden Pacific's records by the OCC because he had no reasonable expectation of privacy in Golden Pacific's records. The court conceded that a person can have a reasonable expectation of privacy in her workplace as well as in her home. 6a; *see O'Connor v. Ortega*, 480 U.S. 709 (1987); *Mancusi v. DeForte*, 392 U.S. 364 (1968). The court found, however, that any expectation of privacy petitioner had in bank documents was not reasonable because he "knew those documents were subject to periodic examination by the OCC," and because the documents "were found in areas other than [petitioner's] office." 9a.

In making the assessment of a reasonable expectation of privacy depend solely upon these two factors—the existence of an administrative inspection scheme and the fact that the documents were not found in petitioner's own office—the Court of Appeals created new and erroneous Fourth Amendment law. Its holding squarely conflicts

with the decisions of the Courts of Appeals for the First and Tenth Circuits in *United States v. Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980), and *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988). Both of those cases, like this one, involved heavily regulated industries whose records are subject to inspection by government agencies pursuant to statute; both involved challenges to a search of an entire business premises, not just the defendant's private office. And in both cases the Court of Appeals rejected the government's arguments that the defendants lacked standing.

In *Brien*, the defendants were employed by Lloyd, Carr & Co., a commodities option "boiler room." The commodities futures business is extensively regulated pursuant to the Commodity Exchange Act and the Commodities Futures Trading Commission Act, 7 U.S.C. § 1 *et seq.*, and Lloyd, Carr was thus required to make its records available for inspection by the Commodities Futures Trading Commission. 7 U.S.C. § 6g(1); 17 C.F.R. § 32.7(e); *see* 617 F.2d at 304. The defendants challenged a search warrant which authorized seizure of "most of the business records of Lloyd, Carr." 617 F.2d at 306. The First Circuit, adopting the district court's multi-factor analysis, rejected the government's contention that the defendants did not have a reasonable expectation of privacy sufficient to permit them to challenge the search. *Id.* at 305-06.[11] In contrast to the Second Circuit's decision in this case, the court did *not* limit defendants' standing only to documents that were seized from their individual private offices (although it identified that as one relevant factor, *see* n.11 *supra*), nor did it hold that the fact that the

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[11] The district court in *Brien* had focussed upon six factors:

> "(1) his [each defendant's] position in the firm; (2) did he have any ownership interest; (3) his responsibilities; (4) his power to exclude others from the area, if any; (5) did he work in the area: (6) was he present at the time of the search."

617 F.2d at 306.

records were subject to inspection deprived defendants of a reasonable expectation of privacy.

United States v. Leary involved a company alleged to have illegally exported certain goods. Federal regulation imposed "comprehensive recordkeeping requirements" on exporters and made those records subject to inspection by government officials. 15 C.F.R. § 387.13(f)(1) (1987) (now 15 C.F.R. § 787.13(f)(1)); *see* 846 F.2d at 597. Two officers of the exporter challenged a search warrant pursuant to which twenty boxes of business records were seized. The Tenth Circuit held that defendants had standing to challenge the search, not limiting their standing to records seized from their private offices. The court specifically rejected the government's argument that the existence of a comprehensive regulatory scheme deprived the defendants of a reasonable expectation of privacy. 846 F.2d at 597.

The decision of the Second Circuit in this case thus cannot be squared with the decisions of the First Circuit in *Brien* and of the Tenth Circuit in *Leary*. Moreover, the decision below was wrong. By limiting its analysis to these two factors, the Court of Appeals created exactly the sort of "talisman[s]" that cannot govern standing determinations in this context. *O'Connor v. Ortega*, 480 U.S. at 709 (plurality opinion).[12]

In addition, the specific factors relied upon by the Court of Appeals are improper. Perhaps the most pernicious and important error of the Court of Appeals was its reliance on the statute making bank records subject to inspection. Its reasoning is entirely circular: according to the Court of Appeals, petitioner cannot challenge the constitutionality of the statute permitting warrantless

[12] Thus, in *O'Connor* this Court canvassed the entire record to determine whether a doctor had a reasonable expectation of privacy in certain parts of his office at a public hospital and, to the extent that the record was unclear, indicated that further proceedings were required. 480 U.S. at 718 (plurality opinion).

inspection of bank documents because the statute made the documents subject to warrantless inspection. This proposition, if taken seriously, would utterly eviscerate the Fourth Amendment's warrant requirement. It would make any warrantless inspection statute passed by Congress immune from challenge. It also conflicts with all of this Court's warrantless inspection cases: never has this Court avoided the necessity of assessing the constitutionality of an administrative inspection statute by simply finding that the existence of the statute deprived the defendant of a legitimate interest of privacy in the records subject to inspection. *See* pp. 17-21 *infra*.[13]

The other factor relied upon by the Court of Appeals in denying that petitioner had a reasonable expectation of privacy in the bank's documents is that the documents were seized from the office of petitioner's co-defendant, rather than from petitioner's own office. This reliance upon the identity of the person whose office was searched ignores the fact that more than one person can have a reasonable expectation of privacy in a particular place, and is analogous to the position urged by the state in *Minnesota v. Olson*, 110 S.Ct. 1684 (1990). In *Olson* the state contended that an overnight guest did not have standing to challenge the search of the home in which he was staying. This Court rejected the state's argument. It noted that even though "the guest has a host who has ultimate control of the house," the guest may still have a legitimate expectation of privacy in the premises. *Id.* at 1689-90. Similarly, a court cannot deny standing to a person to challenge the search of business

[13] The Tenth Circuit in *Leary* discussed the fallacy of relying upon the reduced expectation of privacy in regulated industries to deprive a defendant of standing to challenge an administrative inspection law. As the court noted, while that reduced expectation of privacy "may justify a statutory authorization of warrantless inspections or searches," and may affect the level of probable cause required to obtain a warrant, it does not deprive a defendant of the right to challenge the statute. 846 F.2d at 597 n.6.

premises simply because the premises are someone else's private office; it must canvass all the circumstances to determine whether she has a legitimate expectation of privacy in the premises searched.[14] The Court of Appeals' failure to do so in this case therefore conflicted with the decisions of this Court, as well as those of the Tenth and First Circuits noted above. In addition, the Ninth Circuit has affirmed a district court decision squarely rejecting the argument that a defendant has standing to challenge the search only of his own office. *United States v. Lefkowitz*, 618 F.2d 1313, 1316 n.2 (9th Cir. 1980), *aff'g* 464 F. Supp. 227, 230-31 (C.D.Cal. 1979), *cert. denied*, 449 U.S. 824 (1980).

—The decision of the Court of Appeals denying petitioner standing to challenge the OCC's warrantless search of Golden Pacific National Bank thus conflicted with important Fourth Amendment principles, with the decisions of this Court, and with the decisions of other Courts of Appeals. It has obvious importance for the

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[14] Analysis of the factors relied upon by other courts in determining whether a defendant has standing to challenge the search of corporate premises, *see, e.g., United States v. Horowitz*, 806 F.2d 1222, 1225 (4th Cir. 1986); *United States v. Moscatiello*, 771 F.2d 589, 601 (1st Cir. 1985), *vacated on other grounds sub nom. Carter v. United States*, 476 U.S. 1138, *on remand*, 803 F.2d 20 (1st Cir. 1986), *vacated on other grounds sub nom. Murray v. United States*, 480 U.S. 916 (1988); *United States v. Brien*, 617 F.2d at 305-06; *United States v. Lefkowitz*, 464 F. Supp. 227, 230-31 (C.D.Cal. 1979), *aff'd*, 618 F.2d 1313 (9th Cir.), *cert. denied*, 449 U.S. 824 (1980), demonstrates that petitioner has standing. Petitioner had a significant proprietary interest in Golden Pacific: he or his family owned almost half of the bank's stock. Tr. 7857. More importantly, the record demonstrates significant operational control by petitioner over the bank and all of its premises. *E.g.*, Tr. 431-32, 491-95, 2053, 3057. As the government argued, petitioner "did have his fingers in every area of the bank." Tr. 7939. The records were kept in non-public areas of the bank, and petitioner was present during the search. Thus, the extent of petitioner's control over Golden Pacific and its records—in particular the records of the non-negotiable certificate program—gave him standing to challenge this search.

growing field of prosecutions of financial institutions; if followed by other courts, it would effectively preclude Fourth Amendment challenges to the validity of 12 U.S.C. § 481, as well as other administrative inspection statutes. It merits the attention of, and correction by, this Court.

II. THE CONSTITUTIONALITY OF 12 U.S.C. § 481

The district court upheld the validity of 12 U.S.C. § 481, the statute which empowers the OCC to inspect bank records without a warrant and pursuant to which the OCC conducted its week-long search of the records of Golden Pacific.[15] In so doing, the court decided an important question of federal law that has not been, but should be, decided by this Court, and did so in a manner that is inconsistent with controlling precedent.

That the constitutionality of Section 481 presents an important question of law cannot be disputed. Allegations of fraud in the banking industry are detailed almost daily in the newspapers; calls for vigorous prosecution of banking executives abound from legislators and the public at large. Congress has recently increased the penalties for frauds affecting financial institutions and has directed the Justice Department to increase its prosecution of such offenses. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183, §§ 961-68.[16] These prosecutions will of necessity rely upon the fruits of warrantless inspections of the records of financial institutions, as did the prosecution of petitioner. Such inspections are made not only

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[15] As noted *supra*, p. 10, the Court of Appeals did not specifically address the constitutional validity of Section 481 because of its ruling on the standing issue.

[16] Just recently, in fact, President Bush announced plans for a new task force to ensure aggressive prosecution of crimes against financial institutions. "Bush Promising Quicker Pursuit In Savings Cases," *The New York Times* (June 23, 1990) at 1.

by the OCC pursuant to the authority purportedly granted by 12 U.S.C. § 481, but by other regulatory agencies as well.[17] The viability of these prosecutions, therefore, will depend in substantial part upon the validity of statutes such as Section 481. If Section 481 is unconstitutional—as petitioner believes this Court's prior decisions dictate—Congress should be afforded the opportunity to act quickly to enact a valid inspection scheme.

The general standards governing the constitutional validity of administrative searches such as this one have been delineated by this Court in a series of decisions beginning with *See v. City of Seattle*, 387 U.S. 541 (1967), and *Camara v. Municipal Court*, 387 U.S. 523 (1967); extending through *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); and most recently embodied in *New York v. Burger*, *supra*. It is clear that "the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property," *Donovan v. Dewey*, 452 U.S. 594, 598 (1981), even in a "closely regulated" industry such as banking. *New York v. Burger*, 482 U.S. at 699-700. Warrantless administrative inspections of private commercial property are thus permissible only if the searches are conducted pursuant to a statute which "provides a constitutionally adequate substitute for a warrant." *Donovan v. Dewey*, 452 U.S. at 603; *accord New York v. Burger*, 482 U.S. at 703. In particular, for an administrative inspection to be valid it must be under a statute which "perform[s] the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, *and it must limit the discretion of the inspecting officers.*" *Id.* (emphasis supplied). This

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[17] *See, e.g.*, 12 U.S.C. § 1820(b) (Federal Reserve Board); 12 U.S.C. § 1464(d)(1) (as amended by Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183, § 301) (Office of Thrift Supervision).

last stricture is met only if the statute delineates the "time, place, and scope" of authorized inspections. *United States v. Biswell*, 406 U.S. 311, 315 (1972); *see New York v. Burger*, 482 U.S. at 703. Without such restrictions on the "time, place, and scope" of administrative searches, a statute would "devolve[] almost unbridled discretion upon executive and administrative officers," *Marshall v. Barlow's, Inc.*, 436 U.S. at 323—the precise vice that the Fourth Amendment was intended to eliminate by requiring prior judicial supervision of searches. *See United States v. United States District Court*, 407 U.S. 297, 315-21 (1972).[18].

Section 481 permits just the sort of unfettered administrative discretion that this Court's cases condemn. It provides no limits on "time, place, and scope" of inspection, which alone provide a constitutionally adequate substitute for a warrant. Rather, the statute permits the OCC to examine banks "as often as [it] shall deem necessary," and to inspect whatever records are necessary "to make a thorough examination of all the affairs of the bank." *Supra* p. 2. Thus, the OCC has unbounded authority to determine the frequency, timing and scope of inspections: they can be made as often as the OCC desires, at whatever time of the day or night the OCC chooses, and may be as wide-ranging or as narrow as the OCC, in its own discretion, chooses. Even a closely regulated business such as banking cannot, consistent with the Fourth Amendment and this Court's decisions, be so subject to the arbitrary whim of government agents. As

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[18] "[T]hose charged with . . . investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."

United States v. United States District Court, 407 U.S. 297, 317 (1972).

an instructive contrast, the junkyard inspection statute upheld by this Court in *New York v. Burger, supra*, permitted inspection only during regular business hours and "narrowly defined" the scope of administrative searches to specified kinds of records and vehicles. As a result, this Court held that "the statute, as a whole, places adequate limits upon the discretion of the inspecting officers." 482 U.S. at 711-12 & n.21.

The district court gave three justifications for permitting this warrantless search: (1) requiring OCC examiners to obtain a warrant would be unduly burdensome; (2) "it is the obligation of the OCC to examine the bank" pursuant to the statute; and (3) statutory limitations on time, place and scope of the search were unnecessary because the OCC examiners did not act abusively. 33a. None of these rationales is relevant to the inquiry mandated by this Court's decisions.

The argument that the search was valid because the statute requires the OCC to conduct examinations is obviously fallacious. In each of the administrative inspection cases which has come before this Court, a statute has authorized the challenged search, but the search has been upheld only if the statute passes constitutional muster. While the absence of a statute would be fatal to an administrative inspection scheme, the existence of a statute does not end the analysis but begins it.

Nor is the burden of obtaining a warrant a consideration that this Court has deemed relevant in the context of administrative searches. Surely the burden on the Occupational Safety and Health Administration to obtain warrants before conducting inspections was equivalent to that upon the OCC, yet that did not save the statute in *Marshall v. Barlow's, Inc.*, 436 U.S. at 316-21. Moreover, the district court undoubtedly exaggerated the burdens on the government of following the command of the Fourth Amendment. Administrative warrants are typically obtainable with a minimum of effort, *id.* at 320-21,

and Congress always has the alternative of enacting a statute that validly confines the discretion of the OCC. But the shortest answer to the district court's reasoning, of course, is that if the Fourth Amendment requires that a warrant be obtained, the fact that law enforcement might thereby be made less efficient is no answer. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

Finally, it is irrelevant that in this case the agents may not have exceeded the authority which a properly drawn warrant or statute would have provided them. This Court has recently reiterated the "cardinal principle" that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Horton v. California*, 58 U.S. L.W. 4694, 4696 n.4 (U.S. June 4, 1990), *quoting United States v. Ross*, 456 U.S. 798, 824-25 (1982); *Mincey v. Arizona*, 437 U.S. at 390; *Katz v. United States*, 389 U.S. 347, 357 (1967). In this case, the government contends that the administrative search exception applies. That exception depends, however, upon the existence of a regulatory statute that provides a "constitutionally adequate substitute for a warrant." If the statute fails adequately to confine the agent's discretion, the search is invalid even if the agent did not abuse her discretion in the particular case. *New York v. Burger*, 482 U.S. at 702-03.[19]

In short, the decision upholding the constitutionality of 12 U.S.C. § 481 is an important question of federal law, likely to recur and potentially affecting numerous cases. It was wrongly decided in this case, and this Court should grant the petition for certiorari.

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[19] *Cf. Florida v. Wells*, 110 S.Ct. 1632 (1990) (inventory search permissible only if based upon "standardized criteria . . . or established routine").

III. THE SEARCH OF PETITIONER'S LAW OFFICE

The Court of Appeals upheld the FDIC's search of petitioner's law office on the ground that the business of the bank was commingled with the law office. The court's decision on this issue conflicts with that of the Seventh Circuit in *United States v. Cerri*, 753 F.2d 61 (7th Cir.), *cert. denied*, 472 U.S. 1017 (1985). The Seventh Circuit in *Cerri* held that officers with authority to search a business without a warrant may not search other premises unless they have, at a minimum, probable cause to believe that the other premises are being used to conduct the business. *Id.* at 64.[20] While the Court of Appeals in this case did not explicitly reject the probable cause requirement,[21] the facts it relied upon clearly do not establish probable cause to believe that bank business was being conducted from the law firm.

The court cited only three facts: that the law firm and the bank shared telephone lines, that there was "easy access" to the bank from the firm, and that there was no building directory listing the firm. 11a.[22] These

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[20] Judge Posner's opinion for the court of appeals in *Cerri* actually intimated that more than probable cause might be required, but did not find it necessary to determine the precise standard because the facts in that case demonstrated that the agents knew to a certainty that the defendant was conducting his firearms business from his home. 753 F.2d at 64.

[21] The Court applied a "sufficient cause" standard. 11a.

[22] The Court of Appeals also mentioned the fact that the law firm was petitioner's only office in the building. 11a. However, nothing in the record suggested that the FDIC was aware of this at the time it determined to search the law firm. *Compare* 3/9/88 Tr. 173 (FDIC official refers only to access to firm from bank and interconnected telephone lines as basis for search). Nor did the district court find that the FDIC knew of, or relied upon, this fact. 20a. Obviously, probable cause must be tested by what was known to the agents at the time of the search, not by what they subsequently learned. *Maryland v. Garrison*, 480 U.S. 79, 85 (1987) ("[W]e must judge the constitutionality of [officers'] conduct in light of the information available to them at the time they acted.").

facts, however, do not come close to establishing "probable cause" to believe that petitioner was conducting bank business from the law firm; they do no more than establish the existence of some relationship between the two entities. *Cf. Sibron v. New York*, 392 U.S. 40, 62-63 (1968) (probable cause not established by mere association between defendant and drug addicts). Innumerable law firms throughout the country represent banks and many of them doubtless have offices in the same building as the bank they represent.[23] To hold each of these firms subject to search if the bank went into receivership would be drastic indeed; in this case the FDIC agents prevented the other lawyers in the firm from conducting their business during the days that the search was in progress, and refused to allow them to remove law firm files until the files were reviewed. 3/9/88 Tr. 99, 104-09. And nothing in the facts cited by the Court of Appeals established anything more than the existence of a close attorney-client relationship between the bank and the law firm.

Nor can it be claimed that the search could be conducted upon a lesser standard than probable cause to believe that the law firm was subject to search as part of the bank. *Arizona v. Hicks*, 480 U.S. 321 (1987), compels this conclusion. In *Hicks* this Court ruled that items observed in plain view during a valid search could not be seized unless there was probable cause to believe that the items in question were evidence of a crime or contraband.[24] "Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require,

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[23] Indeed, many large New York City law firms have offices in the same buildings as the banks they represent. Obviously, the same Fourth Amendment rules should protect Chuang and Associates and a large firm such Milbank, Tweed, Hadley & McCloy.

[24] The Court made clear that the same reasoning applied to searches as to seizures. 480 U.S. at 327-28.

i.e., the standard of probable cause." 480 U.S. at 327 (emphasis in original).[25] Similarly here, the FDIC's authority to search bank premises without a warrant did not confer upon it unlimited power to search anywhere it wanted on the pretext that the premises were part of the bank; unless the FDIC had probable cause to believe the premises were subject to search as part of the bank, the search was improper.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 27, 1990

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[25] No exigent circumstances or compelling government necessity existed to justify a search based upon less than probable cause. *Cf. Maryland v. Buie*, 110 S.Ct. 1093 (1990).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 692, Dockets 89-1309, 89-1406

UNITED STATES OF AMERICA,
Appellee,

v.

KUANG HSUNG J. CHUANG, a/k/a "JOSEPH CHUANG",
Appellant.

Argued Feb. 7, 1990

Decided Feb. 28, 1990

Herve Gouraige, Asst. U.S. Atty., New York City (Otto G. Obermaier, U.S. Atty., Martin Klotz, and Kerri M. Bartlett, Asst. U.S. Attys., on the brief) for appellee U.S.

Robert S. Litt, Washington, D.C. (Bruce S. Oliver, Elena Kagan, and Williams & Connolly, Washington, D.C., on the brief) for appellant Kuang Hsung J. Chuang.

Before TIMBERS, NEWMAN and ALTIMARI, Circuit Judges.

TIMBERS, Circuit Judge:

Appellant Kuang Hsung J. Chuang appeals from a judgment of conviction entered August 1, 1989, in the Southern District of New York, Miriam Goldman Cedar-

baum, *District Judge*, upon a jury verdict on twenty-two counts, including misapplication of bank funds, making false statements to bank regulatory officials, other substantive counts, and conspiracy. The district court denied Chuang's pretrial motions to suppress evidence obtained from warrantless searches of his bank and law offices.

On appeal, we find that the chief claim of error raised by Chuang is that the district court erred in denying his suppression motions. Other claims of error have been raised and considered.

For the reasons which follow, we affirm the judgment of conviction.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Chuang was the chairman, president and chief executive officer of the Golden Pacific National Bank ("GPNB"). On June 17, 1985, after receiving information from an informant about certain activities at GPNB, the Office of the Comptroller of the Currency ("OCC") began a warrantless examination, pursuant to 12 U.S.C. § 481 (1988), of bank records pertaining to the sale of a bank product known as "non-negotiable certificates." GPNB received no prior notice of this examination.

At about 1 P.M. on June 17, three bank examiners from the OCC entered GPNB in Manhattan and went to Chuang's office on the third floor of the six-story bank building. They produced an administrative subpoena and requested Chuang to provide documents related to the non-negotiable certificate program. In response to their request, Chuang instructed Theresa Shieh, a vice-president and cashier at GPNB, to produce the requested documents. It is undisputed that virtually all the docu-

ments reviewed by OCC examiners came from Shieh's office located on the fourth floor of the bank building; that no documents came from Chuang's office; that these documents were bank documents, not personal documents belonging to Shieh or Chuang; and that virtually all of the documents were given to the OCC upon request.

As a result of this examination, which lasted until June 21, the OCC examiners concluded that the sale of the non-negotiable certificates was fraudulent, and that Chuang had misrepresented to regulatory officials facts concerning the certificates and the use of bank funds derived from the sale of those certificates. They discovered that several hundred non-negotiable certificate customers had approximately $17 million in claims against GPNB. Not satisfied with the evidence concerning the assets underlying those liabilities, the OCC declined Chuang's request to liquidate the assets. The OCC determined that GPNB was insolvent and, on June 21, 1985, appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver.

The FDIC secured the bank building on the evening of Friday, June 21. The next day, it began the extensive process of examining bank documents and calculating assets and liabilities. A law firm, Chuang & Associates, owned by Chuang, was located on the third floor of the bank building. As part of its examination of GPNB, the FDIC searched the third floor offices of Chuang and his secretary where they performed both bank and law firm work.

On May 19, 1987, Chuang was indicted, together with Shieh, in a 48-count indictment. Prior to trial, defendants moved to dismiss the indictment on various grounds, including duplicity and failure to state an offense. They also moved to suppress the evidence obtained by the OCC during its warrantless examination of GPNB and evidence obtained by the FDIC during its warrantless ex-

amination of the offices of Chuang and his secretary. The district court denied these motions.

Prior to trial, two superseding indictments were returned and several counts were severed. At the close of the government's case, several counts were dismissed by the district court. The case was submitted to the jury on twenty-two counts. Count One charged Chuang and Shieh with conspiring to defraud the United States, to misapply bank funds, and to make false statements to bank regulatory officials and agencies, in violation of 18 U.S.C. § 371 (1988). Counts Two through Eleven charged both defendants with making false statements and concealing bank deposits from bank regulatory agencies, in violation of 18 U.S.C. § 1001 (1988). Counts Twelve through Fourteen charged both defendants with making false statements to bank regulatory officials and agencies, in violation of 18 U.S.C. § 1001. Counts Fifteen through Twenty charged both defendants with misapplication of bank funds, in violation of 18 U.S.C. § 656 (1988). Count Twenty-One charged Chuang with conspiracy to cover up illegal campaign contributions made with bank funds, in violation of 18 U.S.C. § 371. Count Twenty-Two charged both defendants with wire fraud, in violation of 18 U.S.C. § 1343 (1988).

The essence of the government's case was that defendants defrauded bank customers by selling ordinary certificates of deposit called "non-negotiable certificates"; that they diverted the funds received to personal businesses without informing the customers or GPNB's board of directors and without insuring the funds with the FDIC; and that they misrepresented the facts regarding the non-negotiable certificate program to bank regulatory officials.

The jury trial began on September 26, 1988 and concluded on January 18, 1989, when the jury returned guilty verdicts against both defendants on all 22 counts. On June 1, 1989, the district court sentenced Chuang to

concurrent five year terms of imprisonment on all counts. On August 1, 1989, the court ordered Chuang to comply fully with all the terms of a settlement agreement with the FDIC and to make restitution of $200,000.

This appeal by Chuang followed.

II.

Chuang's chief claim of error centers upon two discreet searches made respectively by the OCC and the FDIC.

We turn first to the propriety of the district court's order denying the motion to suppress documents obtained by the OCC's warrantless search.

In his motion to suppress bank documents obtained by the OCC during its June 1985 examination of GPNB pursuant to 12 U.S.C. § 481 (1988), Chuang asserted that the examination violated the Fourth Amendment. Specifically, he claimed that § 481, which authorizes warrantless examinations of national banks, is unconstitutional on the ground that it does not provide "a constitutionally adequate substitute for a warrant", as required by the Supreme Court in *New York v. Burger*, 482 U.S. 691, 703 (1987). Observing that none of the documents inspected by the OCC was obtained from Chuang's office, the district court ruled that Chuang lacked standing to challenge the OCC's examination of GPNB. Chuang asserts that the district court erred in this determination. He renews on appeal his claim that § 481 is unconstitutional. We need not address the merits of this constitutional challenge since we agree with the district court that Chuang has not established a legitimate expectation of privacy in the bank documents examined by the OCC.

In reviewing the district court's determination that Chuang lacked standing, we are mindful that the Supreme Court has dispensed with the notion of standing as being theoretically distinct from the substantive merits of a Fourth Amendment claim. *Rakas v. Illinois*, 439 U.S. 128, 133, 140 (1978). In *Rakas*, the Court con-

cluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139. Put another way, the proper inquiry turns on whether "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140.

With *Rakas* in mind, we focus on whether defendant has established a legitimate expectation of privacy in the area searched. *United States v. Rahme*, 813 F.2d 31, 34 (2 Cir. 1987); *United States v. Smith*, 621 F.2d 483, 486 (2 Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981); *United States v. Brien*, 617 F.2d 299, 305 (1 Cir.), *cert. denied*, 446 U.S. 919 (1980). This threshold question involves two separate inquiries: first, Chuang must demonstrate a subjective expectation of privacy in a searched place or item; and second, his expectation must be one that society accepts as reasonable. *United States v. Paulino*, 850 F.2d 93, 97 (2 Cir. 1988), *cert. denied*, 109 S.Ct. 1967 (1989).

It is well-settled that a corporate officer or employee in certain circumstances may assert a reasonable expectation of privacy in his corporate office, and may have standing with respect to searches of corporate premises and records. *See, e.g., United States v. Leary*, 846 F.2d 592, 595-96 (10 Cir. 1988); *United States v. Brien*, *supra*, 617 F.2d at 305-06; *United States v. Lefkowitz*, 464 F.Supp. 227, 230-31 (C.D. Cal. 1979), *aff'd*, 618 F.2d 1313 (9 Cir.), *cert. denied*, 449 U.S. 824 (1980); *see also Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) ("one has standing to object to a search of his office, as well as of his home"). The question whether a corporate officer has a reasonable expectation of privacy to challenge a search of business premises focuses principally on whether he has made a sufficient showing of a possessory or proprietary interest in the area searched. *E.g., United States v. Brien, supra*, 617 F.2d at 305-06; *United States*

v. Lefkowitz, supra, 464 F.Supp. at 230-31. Moreover, he must demonstrate a sufficient "nexus between the area searched and [his own] work space." *United States v. Britt,* 508 F.2d 1052, 1056 (5 Cir.), *cert. denied,* 423 U.S. 825 (1975). The presence of these factors necessarily must be determined on a case-by-case basis. *Cf. O'Connor v. Ortega,* 480 U.S. 709, 718 (1987) ("Given the great variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.").

Chuang asserts that, as a corporate officer of the bank, he established a sufficient expectation of privacy in the bank premises to dispute the legality of OCC's examination. He claims that he had a significant proprietary interest in the bank, since he or his family owned almost half of all outstanding bank stock at the time the bank was closed. He also claims that he exercised significant operational control over the bank and all of its premises, and that the areas searched were non-public areas over which ultimate control rested in his hands. Further, he points out that he was present during OCC's examination of the bank. In view of the context in which OCC conducted its search, however, we hold that these factors were insufficient to establish a cognizable Fourth Amendment claim.

We observe that the bulk of the bank documents produced for the OCC were obtained from the office of another officer of the bank, Theresa Shieh. Her office was located on the fourth floor of the bank building. None of the documents came from Chuang's office on the third floor. Chuang failed to demonstrate a sufficient nexus between the areas from which the documents were obtained and his own office. Moreover, all of the documents examined were bank documents subject to periodic examinations by the OCC, which has a statutory duty under § 481 to examine the affairs of every national bank

at least twice a year. 12 C.F.R. § 4.11 (1989). Under these circumstances, we are not convinced that Chuang demonstrated even a subjective desire to keep the bank documents private.

Moreover, even assuming Chuang demonstrated a subjective expectation of privacy, we cannot conclude that that expectation is one society considers reasonable. The Supreme Court has held that the "expectation [of privacy] is particularly attenuated in commercial property employed in 'closely regulated' industries." *New York v. Burger*, *supra*, 482 U.S. at 700; *see also O'Connor v. Ortega*, *supra*, 480 U.S. at 717 ("[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of . . . legitimate regulation"). Indeed, the Court has held that "[c]ertain industries have such a history of government oversight that *no* reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (emphasis added) (citing *Katz v. United States*, 389 U.S. 347, 351-52 (1967)); *see also O'Connor v. Ortega*, *supra*, 480 U.S. at 718 ("some government offices may be so open to fellow employees or the public that *no* expectation of privacy is reasonable") (emphasis added).

In view of the pervasive nature of federal regulation of the banking industry, Chuang, as an officer of the bank, knew that bank documents, whether kept in his office or another office, were subject to periodic examination by the OCC. The existence of a regulatory scheme necessarily reduces a bank officer's expectation of privacy in his corporate office. *New York v. Burger*, *supra*, 482 U.S. at 700; *O'Connor v. Ortega*, *supra*, 480 U.S. at 717. That privacy interest is attenuated to the point where any warrantless examination of his office pursuant to a regulatory scheme may be reasonable within the meaning

of the Fourth Amendment. *New York v. Burger*, *supra*, 482 U.S. at 702. This is not to say that Chuang had *no* legitimate expectation of privacy in his own office so as to deprive him of standing to challenge a search of that office. He still could reasonably expect that no one other than fellow employees and business or personal invitees would enter his office, and that nothing would be removed from his desk or file cabinets without his permission. *Mancusi v. Forte*, *supra*, 392 U.S. at 369.

The bank documents examined by the OCC, however, were obtained from areas of the bank other than Chuang's office. Virtually all of them came from Shieh's office. In view of the heavily regulated nature of the banking industry, we decline to accept Chuang's assertion that he had standing to challenge the legality of the examination of those documents. The fact that Chuang, as an officer of a national bank, knew those documents were subject to periodic examination by the OCC, coupled with the fact that they were found in areas other than Chuang's office, lead us to conclude that Chuang's Fourth Amendment rights were not infringed by the OCC examination.

We do not suggest that, since banking is a heavily regulated industry, no bank officer ever can have a reasonable expectation of privacy in bank documents, and therefore that no bank officer ever can challenge successfully an examination of the bank pursuant to § 481. Under the circumstances of the instant case, however, where the heavily regulated nature of the banking industry diminished a bank officer's expectation of privacy in bank documents, and where those documents were obtained from areas of the bank *other* than the officer's own office, we decline to accept any privacy interest as objectively reasonable.

We hold that Chuang cannot successfully challenge the legality of OCC's examination of GPNB because he has not demonstrated a sufficient privacy interest in bank

documents, not found in his office, that he knew were routinely subject to OCC examination.

III.

This brings us to the propriety of the district court's order denying the motion to suppress documents obtained by the FDIC's June 1985 warrantless search of the offices of Chuang and his secretary. *United States v. Chuang*, 696 F.Supp. 910 (S.D.N.Y. 1988).

Although the FDIC did not obtain a search warrant or seek court approval of any kind, Chuang does not challenge the authority of the FDIC, as a properly appointed receiver of GPNB pursuant to 12 U.S.C. § 1821(d) (1988), to examine the bank itself without a warrant. He asserts, however, that his office and that of his secretary were part of his law firm, Chuang & Associates, and that the FDIC's search of those "independent law offices" went beyond any lawful authority of a receiver. We disagree.

The district court found that, based on the physical lay-out of GPNB and its close relationship to the law firm, the offices of Chuang and his secretary were "an important part of the Bank", where not only law firm business but also banking business was conducted. 696 F.Supp. at 913. The court correctly concluded, since banking is a "closely regulated" business, that Chuang voluntarily reduced the expectation of privacy in the firm's premises by operating his law firm out of the same offices from which he ran GPNB. *Id.* (citing *New York v. Burger*, *supra*, 482 U.S. at 700).

Moreover, the FDIC, as a properly appointed receiver of GPNB, had the power and duty pursuant to § 1821(d) to marshal GPNB's assets and to wind up its affairs. As Chuang concedes, the FDIC as receiver stood in the shoes of GPNB and had authority to look through all of GPNB's premises and papers without a warrant. *See*

United States v. Gordon, 655 F.2d 478, 487 (2d Cir. 1981) (Oakes, J., concurring) (when the Superintendent of Insurance acts "by virtue of his receivership powers, [he is] in effect acting as with a warrant issued upon a showing of probable cause"). We have upheld a search of a law office with a warrant as reasonable where the law office is commingled with a business that is the legitimate object of the search. *National City Trading Corp. v. United States*, 635 F.2d 1020, 1024-26 (2 Cir. 1980). Since the area searched by the FDIC clearly functioned as a mixed-use bank and law office for Chuang, and since the FDIC as receiver may properly search GPNB without a warrant, we agree with the district court that the FDIC search was reasonable.

We find no merit to Chuang's assertion that the FDIC had no probable cause to believe that Chuang's office and his secretary's office were used for GPNB business. *United States v. Cerri*, 753 F.2d 61, 62-64 (7 Cir.), *cert. denied*, 472 U.S. 1017 (1985) (warrantless search of home is permissible based on probable cause that it was used for business purposes). The physical lay-out of the bank building, including the shared telephone lines of GPNB and the firm, the easy access to GPNB from the firm, and the absence of any building directory listing the firm, clearly suggested a commingling of space. Moreover, the office searched was Chuang's only office in the entire bank building. These factors constituted sufficient cause for the FDIC to believe that there was a commingling of activities in the area searched.

We hold that the district court properly denied Chuang's motion to suppress the evidence obtained by the FDIC in its search of the offices of Chuang and his secretary. In reaching this conclusion, we are mindful of the risk posed by searches of law offices which unnecessarily may intrude on attorney-client privileges. *E.g.*, *National City Trading Corp. v. United States*, *supra*, 635 F.2d at 1026 ("a law office search should be executed

with special care"). That risk, however, was not present here since neither Chuang nor any third parties sought to suppress documents on the ground that they were privileged. *United States v. Chuang, supra*, 696 F.Supp. at 915. Moreover, since there was sufficient cause to believe that the law offices of Chuang and his secretary were commingled with bank business, the FDIC's search of those offices was proper. *National City Trading Corp. v. United States, supra*, 635 F.2d at 1026.

One further matter: Chuang claims that liquor license applications, which showed that his wife owned an interest in two restaurants, were found during a search by the FDIC of the office of one of his law associates and were introduced improperly at trial. According to Chuang, they were integral to the government's proof as to the bank misapplication counts. The government maintains that those applications were obtained from the New York State Liquor Control Authority ("Liquor Authority"), rather than from Chuang's law offices. Indeed, it asserts that no files containing liquor license documents were found during the FDIC search. At trial, liquor license applications submitted to the Liquor Authority were introduced. The district court accepted the government's claim that the actual documents offered were obtained from the Liquor Authority. Since the government denies that the source of those liquor license applications was derived from the FDIC search, and denies that any copies of those documents were found during that search, we decline to disturb the district court's determination, absent any evidence to support Chuang's claim.

IV.

Chuang raises numerous other claims of error, contending that: (1) the court erred in denying his motion to sever the campaign contribution count; (2) the court erred in denying his motion to suppress the false statement counts on the ground of duplicity; (3) the govern-

ment failed to plead and prove bank misapplication; (4) the evidence was legally insufficient to establish wire fraud; (5) the court improperly admitted hearsay evidence; (6) the court improperly instructed the jury on the definition of bank "deposits"; and (7) he was improperly sentenced.

We have considered carefully these contentions and hold that none has merit.

V.

To summarize:

We hold that the district court properly denied Chuang's motion to suppress the evidence obtained from the OCC's examination of GPNB. We also hold that the court properly denied Chuang's motion to suppress evidence obtained from the FDIC's search of his office and that of his secretary. We have considered carefully Chuang's other claims of error and find that none has merit.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of March, one thousand nine hundred and ninety.

Docket Number 89-1309

KUANG HSUNG J. CHUANG,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

[Filed Mar. 29, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, KUANG HSUNG J. CHUANG

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of February one thousand nine hundred and ninety.

Present: HON. WILLIAM H. TIMBERS
HON. JON O. NEWMAN
HON. FRANK X. ALTIMARI
Circuit Judges,

Docket No. 89-1309, -1406

UNITED STATES OF AMERICA,
Appellee,

v.

KUANG HSUNG J. CHUANG, a/k/a "JOSEPH CHUANG",
Appellant.

[Filed Feb. 28, 1990]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH
Clerk

by: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

Issue as mandate: April 5, 1990

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. SS 87 Cr. 440 (MGC)

UNITED STATES OF AMERICA

v.

KUANG HSUNG J. CHUANG, a/k/a "JOSEPH CHUANG," a/k/a "DR. CHUANG," and THERESA SHIEH, a/k/a "JING JAI SHIEH,"

Defendants.

Sept. 20, 1988

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y., New York City by Herve Gouraige, Asst. U.S. Atty., for U.S.

Orans, Elsen & Lupert, New York City by Leslie A. Lupert, Clement J. Colucci, III, for defendant Chuang.

Fischetti & Pomerantz, New York City by Mark F. Pomerantz, Warren L. Feldman, for defendant Shieh.

OPINION

CEDARBAUM, District Judge.

Defendant Chuang has moved pursuant to Fed. R. Crim. P. 12(b)(3) to suppress the evidence resulting from a warrantless search of his office.[1] This search of

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[1] Defendant Shieh's office, located on a different floor of the building in which both defendants worked, is not at issue on this motion. Nor does she have "standing" to move to suppress the evidence taken from Chuang's office, since she had no expectation of privacy in his office.

the offices of the president of a bank and his secretary was performed by the receiver of the bank. The offices were also used by the bank president to run a law firm that was located inside the bank building. For the reasons discussed below, defendant's motion to suppress is denied.

BACKGROUND

Defendant Joseph Chuang was the chairman, president and chief executive officer of the Golden Pacific National Bank ("Bank"). On June 21, 1985, as a result of an examination by the Office of the Comptroller of the Currency, the Bank was closed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. This suppression motion stems from the FDIC's search of the offices of Chuang and his secretary, which were also used by Chuang to run a law firm. An evidentiary hearing was held on certain aspects of this motion on March 9, 1988. In addition, a number of affidavits have been filed.

The law firm, Chuang & Associates, was a sole proprietorship owned by Chuang. The law firm was located on the third floor of the Bank building in the Chinatown section of Manhattan. The rest of at least the first four floors of the building was occupied exclusively by the Bank. Chuang and his secretary had their offices, in which they performed both Bank and law firm work, on the third floor, where a Bank telecommunications room was also located. The rest of the third floor served as office space for the law firm. Chuang's third-floor office was the only office he used as operating head of the Bank.

Chuang & Associates consisted of Chuang himself, three other attorneys, and a paralegal or law clerk. The firm was listed in the telephone directory and in the Martindale-Hubbell law firm directory, and advertised in Chinese-language publications. The Bank was a major client of Chuang & Associates, but the firm had a number

of other clients as well, and the Government concedes that it had an existence separate from the Bank. Transcript of Evidentiary Hearing ("Tr.") at 74.

The relationship between the firm and the Bank was an extremely close one. At the main entrance to the firm on the third floor near the elevator was a large wood sign marked "Chuang & Associates, Attorney [sic] at Law." Chuang's office and the firm were also accessible via an interior staircase from the Bank, which made it easy to travel between the firm and the Bank's offices on the first, second and fourth floors. There was no sign to identify the law firm when it was entered this way. Nor was there a sign or directory at the entrance to the building, in the lobby or in the elevator identifying the law firm as an entity separate from the Bank. The law firm apparently shared telephone lines with the Bank. There is no evidence that there was any formal lease arrangement between the Bank and the firm in 1985. In a one-year lease in effect during the calendar year 1984 the firm subleased space on the third floor from the Bank at a below-market rate. The Bank also paid the salaries of all secretaries at the firm. In exchange, the firm charged the Bank lower rates than it charged other clients.

The FDIC secured the Bank building on the evening of Friday, June 21, 1985. The following day, a Saturday, large numbers of FDIC employees entered the building to begin the extensive process of examining bank documents and calculating assets and liabilities. Ellen Stuart, an FDIC attorney who was responsible for assessing pending legal matters involving the Bank, testified that she entered the law firm offices on June 22 through the interior stairway. She said that she never saw the "Chuang & Associates" sign that day.

Edward G. Miller, an attorney working at Chuang & Associates, testified that when he arrived for work on Monday, June 24, he informed the FDIC that Chuang & Associates was a law firm separate from the Bank. Al-

though Stuart testified that the FDIC took note of the attorneys' claims, and later those of the Bank's lawyers, that Chuang & Associates was a separate law firm, she was skeptical of the claims at the time because of the shared telephone lines, the easy access to the Bank and the absence of any building directory listing the firm.

Chuang & Associates kept its law firm files in the office of Chuang's secretary, as well as in other offices and secretarial and open areas on the third floor. Chuang and the Government agree that Chuang's office and that of his secretary were searched by the FDIC during the week of June 24, and this motion only addresses evidence obtained as a result of the search of those offices. Defendants and the Government are looking into the question of whether any of the Government's evidence stems from a search of other areas of the law firm. Therefore, I do not now address the suppression motion insofar as it concerns areas of the law firm other than the offices of Chuang and his secretary.

DISCUSSION

In searching the premises of the Bank, the FDIC did not obtain a search warrant or seek court approval of any kind. Rather, it acted pursuant to its statutory duty to marshal the assets of the Bank and to wind up the Bank's affairs. 12 U.S.C. § 1821(d). Chuang contends that the FDIC's search of his office and that of his secretary violated the Fourth Amendment because the FDIC was on notice by Monday, June 24 that the offices were part of a law firm. He argues that a warrantless search of a law firm—even if the law firm is intermingled with another entity that can legitimately be searched without a warrant—violates the Fourth Amendument.[2] The Gov-

[2] In his memorandum in support of the suppression motion, Chuang briefly argues that suppression is required because of the Government's alleged failure promptly to prepare an inventory of all the documents seized from the law firm. Memorandum in Support

ernment, in response, contends that under these circumstances no warrant was required.

It is well established that, "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-53, 97 S.Ct. 619, 628-29, 50 L.Ed.2d 530 (1977), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930 (1967); *see New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 747, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in the judgment). It has been noted that searches of documents present special dangers of intrusions upon privacy, *Andresen v. Maryland*, 427 U.S. 463, 482 n. 11, 96 S.Ct. 2737, 2749 n. 11, 49 L.Ed.2d 627 (1976) (upholding search, with warrant, of law office), and that "a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications." *National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980); *see* 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.1(g) (2d ed. 1987).

There is nothing to suggest that any such special care was taken by the FDIC in searching the offices of Chuang and his secretary. Nor has the Government argued that the urgency of searching these offices was so great that obtaining a warrant would have been impractical. Nevertheless, two factors suggest that the search was not unreasonable, in violation of the Fourth Amendment, despite the absence of a warrant. First, the offices of Chuang and his secretary, in addition to being part of the law firm, were also an important part of the Bank.

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of Defendants' Motion for Suppression at 19-20. However, the evidence concerning this legal contention has not been developed, and defendants did not mention it in their letter to the Court dated May 2, 1988 listing the legal questions to be decided.

Bank business in addition to law firm business was carried on there. The exception of privacy in commercial property is "particularly attenuated" where the property is used in "closely regulated" businesses, *New York v. Burger*, —— U.S. ——, 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987), such as national banks.[3] Thus, by operating his law firm out of the same offices from which he ran the Bank, Chuang voluntarily reduced the expectation of privacy in the firm's premises that he might have enjoyed had the firm been located elsewhere.

Second, it is not disputed that, as in *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981), a case involving a receiver for an insurance business, the FDIC as a receiver standing in the shoes of the Bank had authority to look through all of the Bank's premises and papers without a warrant. Chuang makes no claim that such a search, which was carried out for business purposes, violated his privacy interests in his office. *See O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (work-related searches of employees' offices, desks and files are judged by reasonableness standard and are not presumptively invalid without a warrant). He contends only that, even if the FDIC had authority to search Bank premises and documents, it had no authority to search Bank premises that it had been told were also used as part of a law firm.[4] But since the FDIC as receiver had authority to inspect Bank property, and the offices of Chuang and his secretary were Bank property used in running the Bank, the force of Chuang's argument concerning the unreasonableness of searching those offices is diminished. *See National City Trading*, 635 F.2d at 1024 (where space used by business subject to search is also

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[3] In another suppression motion in this case, defendants have not contested that banking is a closely regulated industry.

[4] A somewhat analogous question was left unresolved in *Gordon* for failure to develop an adequate factual record in the district court. 655 F.2d at 484.

used by law office, space is properly subject to search for books and papers of the business).

Faced with these circumstances, Chuang argues that any warrantless search of a law office—even under the facts of this case—is *per se* unreasonable absent exigent circumstances. His argument is based almost entirely on *National City Trading*. In that case, the Second Circuit upheld a search, executed with a warrant, of the offices of a commodity fraud "boiler-room" operation that was run out of a lawyer's suite of offices. As in this case, the space used by the law office and the boiler-room operation was "commingled." 635 F.2d at 1024. The Second Circuit held the search not unreasonable, noting that warrants may be issued to search law offices upon a proper showing of cause and emphasizing the commingling of the activities of the boiler-room operation and of the law office. *Id.* at 1025-26. However, the Court did stress that a law office search "should be executed with special care." *Id.* at 1026. The Court pointed with approval to the "self-regulatory care" exercised by the Government in planning and executing the search. *Id.* An FBI agent and an Assistant United States Attorney had explained to the searching agents the need to avoid any disruption of the law practice or any seizure of documents unrelated to the boiler-room operation. Closed file cabinets in the lawyer's office had not been examined. The lawyer's office had not been searched until the lawyer was present. A legal file concerning the boiler-room operation had been taken but had been sealed without having been inspected. And, of course, a search warrant had been obtained. Chuang urges that where such measures are not taken, or at least where no warrant is procured, a law office search cannot be upheld. The Fourth Amendment prohibition against "unreasonable searches" does not lend itself to *per se* rules. But, in any event, such a rule does not apply in this case.

In *Gordon*, the New York State Superintendent of Insurance was appointed receiver by a state court judge after an insurance busines had been abandoned and the Superintendent had met the statutory requirement of showing that property would be removed from the state, or would be lost, injured or destroyed. 655 F.2d at 483-84. As receiver, the Superintendent had the statutory power, *inter alia*, "to take and hold real and personal property." *Id.* at 483 n. 2. Similarly, in this case the FDIC was appointed receiver pursuant to statute after the Office of the Comptroller of the Currency had made a determination that the Bank was insolvent. 12 U.S.C. §§ 191, 1821(c). As receiver, the FDIC had the power and the duty to marshal the Bank's assets and to wind up its affairs. 12 U.S.C. § 1821(d); *Federal Deposit Insurance Corp. v. Hatmaker*, 756 F.2d 34, 36 n. 2 (6th Cir.1985). In his concurring opinion in *Gordon*, Judge Oakes wrote that the Superintendent was, "when acting by virtue of his receivership powers, in effect acting as with a warrant issued upon a showing of probable cause." 655 F.2d at 487 (Oakes, J., concurring). Reading Judge Oakes's concurrence in *Gordon* together with *National City Trading* suggests that the search at issue here was permissible. If a warrantless search by a receiver is equivalent to a search with a warrant, and if a search of a law office with a warrant is permissible where the law office is commingled with a business that is the legitimate object of the search, then the warrantless search of a law office by a receiver is permissible where the law office is commingled with the business for which the receiver has been appointed.

The primary danger that courts and commentators have seen in law office searches lies in the disclosure to the Government of documents that are covered by the attorney-client and the attorney work-product privileges.[5]

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[5] Where a law firm represents criminal defendants, the Sixth Amendment right to counsel may also be implicated by a law office

See, e.g., Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955, 960-61 (3rd Cir. 1984) (finding unconstitutionally overbroad a warrant authorizing a search of a law firm); *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979) (en banc) (establishing *per se* rule that searches of law offices are impermissible where the attorney is not suspected of a crime and there is no threat that documents sought will be destroyed); Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 Georgetown L.J. 1, 12-23 (1980). In *National City Trading*, addressing an argument that the warrant was insufficiently particular because it authorized seizure of privileged documents, the Second Circuit stated that "[t]o the extent that the files obtained here were privileged, the remedy is suppression and return of the documents in question, not invalidation of the search." 635 F.2d at 1026 (citations omitted). By the same logic, the fact that a search involved privileged documents does not render the entire search unreasonable, at least where there was good reason to believe that documents that could legitimately be searched would be found. Neither Chuang nor any third parties have sought to suppress individual documents seized by the FDIC on the ground that they are privileged.

Finally, the Government relies on *United States v. Cerri*, 753 F.2d 61 (7th Cir.), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3479, 87 L.Ed.2d 614 (1985). In *Cerri*, the defendant was selling firearms from his home, although the home was not the place of business from which he was licensed to sell. Acting pursuant to a statute permitting inspection of the business premises of federally-licensed firearms dealers, federal agents entered the defendant's house without a warrant and seized his guns and business records. The Seventh Circuit upheld

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search. *See, e.g., O'Connor v. Johnson*, 287 N.W.2d 400, 404 (Minn. 1979) (en banc). There is no evidence in the record that Chuang & Associates represented criminal defendants.

the search. It held first that a firearms dealer could not evade the warrantless inspections provided for by the statute simply by moving to an address different from the one on his license. 753 F.2d at 63. That the search was of a home did not alter that conclusion, despite the fact that a warrantless search of a home absent exigent circumstances generally constitutes a *per se* violation of the Fourth Amendment, *see United States v. Karo*, 468 U.S. 705, 714-15, 104 S.Ct. 3296, 3302-03, 82 L.Ed.2d 530 (1984), because a home used as a place of business occupies the same status for Fourth Amendment purposes as does any other place of business. 753 F.2d at 64, citing *Lewis v. United States*, 385 U.S. 206, 211, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966). *National City Trading* noted that, for Fourth Amendment purposes, "there is nothing more sacred about a law office used for business purposes . . . than there is about the premises of a newspaper." 635 F.2d at 1025. Similarly, there is nothing more sacred about a law office used for business purposes than there is about a home used for business purposes. That a home may be searched under these circumstances without a warrant suggests the same conclusion about a law office.

Defendants have also moved to suppress certain records because of alleged violations of the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422. I need not decide whether any violation of the Act took place, because even if it did, suppression is not a remedy authorized by the Act, 12 U.S.C. § 3417, or appropriately imposed in the exercise of the Court's supervisory powers. *United States v. Kington*, 801 F.2d 733, 737 & n.1 (5th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1888, 95 L.Ed.2d 495 (1987); *United States v. Frazin*, 780 F.2d 1461, 1466 (9th Cir.), *cert. denied*, 479 U.S. 844, 107 S.Ct. 158, 93 L.Ed.2d 98 (1986); *United States v. Whitty*, 688 F.Supp. 48 (D.Me. 1988); *United States v. Lee*, 667 F.Supp. 1404, 1419 (D.Colo. 1987).

CONCLUSION

Defendants' motion to suppress evidence obtained as a result of the FDIC's search of the offices of defendant Chuang and his secretary is denied.

SO ORDERED.

[Excerpted Transcript of Record from the
United States District Court
for the Southern District of New York]

* * * *

[88] THE COURT: All right. Well, I would still like to hold a hearing on the issue of consent in any event. But in view of the way in which this has happened, I think I'm going to have to reach the issue that was—that accompanies it and which may turn out to be unnecessary, if I find that there was, in fact, consent.

I still have considerable difficulty with this objection belonging to anyone but Ms. Shieh. If, as the Supreme Court has repeatedly held, we are speaking of an interest in a place—excuse me, an expectation of privacy in a place, if we are speaking of an expectation of privacy in Ms. Shieh's own separate office, it seems to me that she [89] may have some expectation of privacy in that place under the cases.

In view of the fact that there is no question that the records that she was asked to produce and did produce, were clearly subject to examination by the OCC, and that the OCC had a statutory obligation under Section 481 of Title 12 of the United States code, to examine the affairs of every national bank at least twice a year, it seems to me that the records that were produced by Ms. Shieh from her office were clearly bank records that were subject to examination by, and indeed that it was the duty of the controller of the currency, to have those records examined by a bank examiner on a periodic basis.

So that if one were viewing the issue from the vantage point of Ms. Shieh's expectation of privacy in those particular records, as distinguished from her office, it might be said that she did not have a reasonable expectation of privacy in those records as distinguished from her expectation of privacy in her own office.

But since, and these are what we used to call standing questions that I am now addressing, what we used to

call standing, what we now speak of in terms of expectation of privacy, the cases do hold that there—that an employee with a private office, that is an office of her own, has sufficient expectation of some kind of privacy in that place [90] to give her standing with respect to a true search of her office.

This case is a little bit of a hybrid because it's not a true search of her office, it is a request for documents which are clearly bank documents that happen to be located in Ms. Shieh's office at the time.

MR. POMERANTZ: I would use the word demand.

THE COURT: Very well. Very well. I've not yet reached the actual facts on that. And I thing we probably should hold a hearing on that aspect. Because for the moment, I am treating it as something resembling a search, in more traditional terms, even though this is not really exactly a search. And whether it should be treated as—like a search is open to question.

But in any event, what the—what Ms. Shieh is arguing here is that this very old and well-established obligatory obligation of the controller of the currency, to examine the affairs of every national bank at least twice a year, should be subjected to the requirement of a warrant in every case.

MR. POMERANTZ: I'm not sure. I know your Honor pressed me on this when we were last before the court, and I've given it some thought, I am not sure that it is our position—that our position is as your Honor just stated it. I believe—

[91] THE COURT: Are you not attacking the statute on it's face?

MR. POMERANTZ: We are, your Honor, to the following extent, to the extent that the government urges that the statute provides an authority for conduct that may be treated as a search, we believe the statute is unconstitutional on its face.

If all that happened here was the examiners came and said we would like to see these documents and the docu-

ments were then produced, I'm not sure we would have the same issue.

THE COURT: What else happened here? Then I'm puzzled, that's precisely what happened here.

MR. POMERANTZ: I think we can show your Honor that what happened here is that the OCC came in to the bank, cabinets were physically sealed, Ms. Shieh's movements were restricted to some extent, and that there is a line that may be drawn between the conduct of—I'm not abandoning—notwithstanding an argument that the statute is unconstitutional in toto as your Honor has stated it.

But I want to reserve in affect, the fallback position that at the very least the way that this examination was conducted makes this examination akin to a physical search, and that under those circumstances the statute provides no constitutional authority for such a [92] search.

THE COURT: Well, then, I have difficulty with what facts you're relying on.

It seems to me that this bank was examined on a regular basis, to Ms. Shieh's own knowledge, and in—with Ms. Shieh's participation, many times in accordance with the statutory obligation of the controller of the currency. It was clearly forseeable, and all of the officers of the bank and the bank itself had notice that the OCC was required to make periodic examinations, and indeed did make periodic examinations of these very books and records.

MR. POMERANTZ: I don't disagree with that.

THE COURT: I did not understand that there were any particular facts that were being highlighted here, other than the fact that these particular records came from Ms. Shieh's office.

MR. POMERANTZ: No. I've articulated in my letter to the court, the one immediately preceding the September 23 letter, a number of other facts which I think are relevant. The fact that OCC examiners—I, for in-

stance, stayed in the bank we contend, before and after normal business hours. The fact that there were certain areas of the bank that were, and certain cabinets that were physically sealed with red tape.

THE COURT: What has that got to do with the [93] search of Ms. Shieh's office, which is all that I'm addressing? We're only addressing the documents that were taken from Ms. Shieh's office because those are the only documents as to which she had an expectation of privacy.

MR. POMERANTZ: I don't want the record to indicate that we've abandoned any claim that Dr. Chuang has a similar expectation for the reasons indicated in the letter.

THE COURT: We'll get to that separately. That's a more recent issue. Whether Dr. Chuang has some expectation of privacy.

But it was—with respect to Ms. Shieh's expectation of privacy, which is what I understood was being raised only with respect to records taken from her—given by her from her own office, it is only with respect to that search in quotes that I considered the—whether it was unreasonable for the OCC to carry out its regular statutory obligation to examine the books and records of this national bank.

And I go back to what I understood was the defendant's position, that every examination of the books and records of the national bank carried out under its periodic obligation to do so by the OCC requires a search warrant.

MR. POMERANTZ: It is because I understood your [94] Honor to be troubled by such a sweeping notion that I have attempted to suggest to the court a limiting combination of facts. And the distinction I'm trying to draw is this, in previous examinations the OCC first of all gave advance notice when it would be at the bank and what records were required. In those instances the examiners were put into a conference room and records were shuttled in and out to the examiners.

And I could understand a holding by the court that such conduct intruded upon no expectations of privacy, any reasonable expectations of privacy. And I am drawing a line between that type of examination and an examination that was conducted in the fashion that this one was conducted. Because I think there is a line that can be drawn between those two very different types of conduct. And that while your Honor could conceivably hold that the statute authorized the former type of examination, consistent with the constitution, our argument would be for the reasons cited in our memorandum, under all the administrative search cases, that conduct of the type that occurred in this case is not constitutionally undertaken with only this statute as its basis.

THE COURT: And do I understand that what your distinction is, is that in this case the bank examiner actually entered Ms. Shieh's office and requested documents [95] there and examined documents there?

MR. POMERANTZ: That's one factor, Judge. I think in a practical sense it goes much beyond that. This was much more in the nature of a raid. I don't want to overstate it, but in comparison—

THE COURT: Are you suggesting that if there is wrongdoing suspected, is that—there should be some distinction?

MR. POMERANTZ: No, I'm suggesting that if what the OCC really wants to do is search the bank, they're either supposed to act under a valid statute or supposed to get a search warrant, which is precisely considered doing in this case and wound up not doing.

THE COURT: But I have difficulty considering their other examinations, not searches, in the sense in which you are describing them. That is the mere fact that they did not sit in a conference room and rather entered Ms. Shieh's office.

While that may give her standing because she has expectations of some privacy in her own office, if what they did was request records as they had always done, and examine them, I do not understand the distinction.

And I have great difficulty applying an absolute rule to the Fourth Amendment which speaks in terms of unreasonable searches. I have great difficulty holding that [96] on the face of this ancient statute it is unreasonable for the bank examiners of the office of the controller of the currency, who are obligated by law at least twice a year to examine the affairs of every national bank, to go to a magistrate and get a search warrant for every such examination. I think it is unduly burdensome and I do not—I think the statute provides the probable cause that a magistrate would find because it is the obligation of the OCC to examine the bank.

MR. POMERANTZ: I'm not making a probable cause-type argument, your Honor.

THE COURT: And as to how exactly a magistrate would limit what is a search that is essentially limited to the books and records of the bank by the statute, I do not understand, that the Wang examiners have to come in during business hours of the bank is clear because they do not break into the bank. Nor is there any suggestion here that anybody broke in, nor have the bank examiners ever broken in.

MR. POMERANTZ: Let me explain what my argument is.

I think your Honor referred to the antiquity of the statute, I think that's precisely the problem.

In constitutional terms this statute came on the books before all the law was made with respect to [97] administrative search. I think if Congress set down to draft the statute now, it would articulate the kinds of safeguards that the Supreme Court has referred to in cases such as Berger against New York. And there would be no undo burden on the OCC.

The Congress could well draft a statute that would indicate to the OCC when it is supposed to go in and examine books and records, how much notice it's supposed to give, if any, and speak with some particularity.

It is because this statute, and again perhaps because it is as old as it is, simply gives the OCC carte blanche

to go in and do whatever it wants to inside the bank in the way of examining records that we claim it is. I am not suggesting a regime under which you—every time before there is an examination of a national bank that the bank examiners and the OCC has to go running to a magistrate.

My argument is that it so happens that because of the sequence here, that the statute was enacted so long before the applicable case law.

What happened is that the statute under which the OCC is acting is indeed unconstitutional as applied to conduct that can be analogized to a search. It's only a narrow group of cases your Honor could well find in which that last statement is true that the conduct is a analogus—analogous to a search. But in that category of [98] cases, however broad or however narrow it is, I am suggesting that the court should hold the statute to be unconstitutional and the remedy undoubtly would be a new statute, not a regime under which magistrates have to become involved with this.

THE COURT: When I read this statute as authorizing, indeed obligating the controller of the currency regularly to examine the books and records of every national bank, I don't understand how that is, as you say, analagous or not analagous to a search. I am assuming that you are arguing that that examination is analagous to a search.

MR. POMERANTZ: I don't want to bite off more than I have to. I'm arguing that this particular examination at this bank this week was a search.

THE COURT: Well, you have not shown me sufficient grounds for distinguishing this particular examination in constitutional terms, in terms of reasonableness from all of the examinations that had gone before and that are required and we'll twice annually for every national bank in the country.

* * * *

[8610] THE COURT: Also, I would also like to raise an entirely unrelated point, which was there was one oc-

casion [8611] at the beginning of the trial where I tried to put on the record, my disposition of the last suppression motion, which I had denied. And I would like to—like it to be clear that although the parties apparently did not understand that as a disposition, it was my intention at the time to make such a disposition.

And perhaps what I should do as well is cite particularly the two Supreme Court cases that I considered most closely analogous to this case.

I do not have the citations with me, but I'm sure you are all familiar both with the case involving a visit by a probation officer to—an unannounced visit by a probation officer to a defendant's home.

I did consider the discussion we had on the motion with respect to documents taken from Ms. Shieh's office as setting forth my view on that subject. That is, I had concluded that Ms. Shieh was the only one of the defendants with some privacy interest in the contents of her own space. And therefore this was a motion as to which, really, only Ms. Shieh had standing. And that her expectation of privacy in that place was not reasonably an expectation that bank examiners would not examine the records of the bank which were kept in her office and which she supplied to them in response to requests.

To the extent that the motion was based on an [8612] absolute requirement of a search warrant I concluded that the doctrine that a search warrant is required does not apply in a situation like the regular examination of a national bank in which there is a statutory duty on the OCC regularly to examine the records of the bank. And we are speaking now of an examination of the records of the bank. We are not speaking of private documents which Ms. Shieh happened to keep in her office.

As I understand it, we are speaking only of bank records in connection with that motion. Is that correct?

MR. GOURAIGE: I think that's correct, your Honor. The only document that the defendants claimed was not a bank record was a mortgage repayment book. As your

Honor may recall, the government had withdrawn that document and said that that would not be offered at trial.

THE COURT: All right, so that that document was not used?

MR. GOURAIGE: That's correct.

THE COURT: The only documents that were used at trial were bank documents, to the extent that documents were used, that had been examined, which were normally located in Ms. Shieh's office in the bank?

MR. GOURAIGE: That's correct.

THE COURT: Very well.

MR. POMERANTZ: I believe that is correct, your [8613] Honor. Of course it's difficult, as I stand here, to think back over the months of testimony and the—

THE COURT: Right. But it was my understanding that the motion was really based on the assumption that private personal documents were not at issue here, that we were speaking, and apparently that is all that has been offered, according to the government, in accordance with that understanding.

And as to those documents, on the facts that were established earlier in the case, I concluded, as I tried to explain at the beginning, that a search warrant was not required, and that Ms. Shieh's reasonable expectations of privacy were not improperly invaded, unconstitutionally invaded by the examination of bank records which happen to be kept in Ms. Shieh's office and which in most cases she actually turned over herself in response to requests.

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